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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
56793-S76GJ BY KOLBECK RANCHES, INC.)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of April 7, 1988, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions and limitations set forth below, Application for Beneficial Water Use Permit No. 56793-76GJ by Kolbeck Ranches, Inc. is hereby granted to appropriate 4.375 cfs (175 m.i.) up to 599 acre-feet per annum from Flint Creek, a tributary of the Clark Fork River, from May 1 to August 1,

CASE # 56793

inclusive, each year, by means of headgate located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 9 North, Range 13 West, Granite County, Montana, and ditch, for supplemental flood irrigation of 166 acres located in the N $\frac{1}{2}$ of Section 36, and 5 acres located in the NE $\frac{1}{4}$ of Section 35, all in Township 10 North, Range 13 West, Granite County, Montana. The priority date is August 17, 1984 at 2:10 p.m. The remainder of the appropriation requested in the Application is hereby denied. This permit is issued subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such water rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittees to divert water to the detriment of any senior or junior appropriator.

B. The Permittees shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

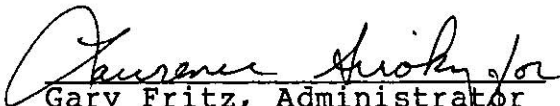
D. Permittee shall not divert water hereunder to the extent diversion of water under (claimed) Water Right No. 8532-76GJ exceeds 1231 acre-feet per annum. For example, if Applicant diverts 1500 acre-feet in a given year under Water Right No. 8532-76GJ, it may only divert 330 acre-feet pursuant hereto in that year.

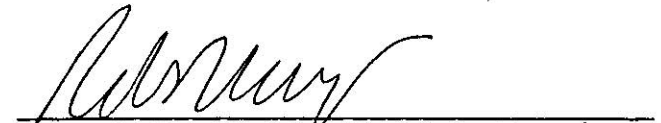
CASE # 56793² -

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 10 day of May, 1988.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605


Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

- CERTIFICATE OF SERVICE

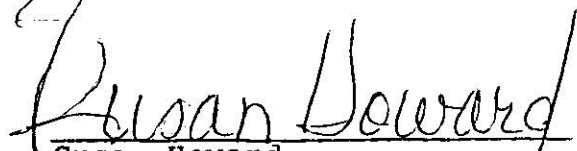
This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 12th day of May, 1988, as follows:

Kolbeck Ranches, Inc.
Box 36
Hall, MT 59837

Carl Nelson Ranch Company
Star Route 35
Drummond, MT 59832

Johnmarywell, Inc.
Box 31
Hall, MT 59832

Mike McLane
Missoula Field Manager
P O Box 5004
Missoula, MT 59801


Susan Howard
Hearings Reporter

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
56793-S76GJ BY KOLBECK RANCHES, INC.)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 8, 1987, in Philipsburg, Montana.

Appearances

Applicant Kolbeck Ranches, Inc. (hereafter, "Applicant" or "Kolbeck") was represented by Evan Kolbeck, secretary of said corporation.

--Tara Kolbeck and Arthur Kolbeck appeared as witnesses for the Applicant.

Objector Carl Nelson Ranch Co. was represented by Billie Struna, vice-president of said company.

Objector Johnmarywell, Inc., was represented by Julia Enman, who appeared in lieu of signatory, Wellington Enman.

Untimely Objector Fred Parker appeared pro se.

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Michael P. McLane, Field Manager of the Missoula Water Rights Bureau Field Office of the Department of Natural Resources and Conservation (hereafter, "department" or "DNRC"), appeared as DNRC staff witness.

Exhibits

Applicant introduced no exhibits.

Objectors introduced no exhibits.

DNRC introduced one exhibit.

Department Exhibit 1 is a manila folder containing two sections. One section is entitled "Correspondence" and contains copies of nine letters and two memoranda prepared by Mike McLane, as well as one letter from Evan Kolbeck. The other section is entitled "Field Report & Research Materials." It contains a two-page document headed "Field Investigation", a two-page document entitled "Amendment to General Findings of Fact and Conclusions of Law to the Flint Creek Basin Temporary Preliminary Decree", and two abstracts of water right (2 pages each) for Kolbeck Ranches, Inc. Department Exhibit 1 was admitted into the record without objection.

There was no objection to any of the contents of the department file.

PROPOSED FINDINGS OF FACT

1. MCA Section 85-2-302 provides that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

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2. The application was regularly filed on August 17, 1984 at 2:10 p.m.

3. The pertinent facts of the Application were published in the Philipsburg Mail, a newspaper of general circulation in the area of the source, on October 4 and October 11, 1984. Timely objections were received from Johnmarywell, Inc. by Wellington Enman, and from Carl Nelson Ranch Co. by Billie Struna, vice-president. Notice of this hearing was duly served on all parties on June 10, 1987 via certified mail. Fred Parker, an irrigator in the area of the proposed appropriation appeared at the hearing, then entering his untimely objection to the Application.

4. By this Application, Applicant seeks to appropriate a total of 11.4 cubic feet per second (cfs), i.e., 456 miner's inches (m.i.), up to 1607 acre-feet per annum from Flint Creek for supplemental flood irrigation of 287 acres described as follows: 121 acres located in the NE $\frac{1}{4}$ of Section 35, Township 10 North, Range 13 West, Granite County, Montana, and 166 acres located in the N $\frac{1}{2}$ of Section 36, Township 10 North, Range 13 West, Granite County, Montana. Diversion would be made at two points. 4.6 cfs (184 mi) up to 648.5 acre-feet per annum would be diverted in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 10 North, Range 13 West, Granite County, Montana, by means of existing headgate, and thence conveyed by existing ditch (hereafter, the "west-side ditch"). 6.8 cfs (272. m.i.) up to 958.5 acre-feet per annum would be diverted in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 9 North, Range 13 West, Granite County, Montana, by means of existing headgate, and thence conveyed by existing ditch (hereafter, the "east-side ditch").

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5. Applicant timely filed Statements of Claim for Existing Irrigation Water Rights No. 8531-76GJ and No. 8532-76GJ. Statement of Claim No. 8531-76GJ claims 2.5 cfs (100 m.i.) up to 900 acre-feet per annum for flood-irrigation of 140 acres located in the NE $\frac{1}{4}$ of Section 35, Township 10 North, Range 13 West, Granite County, Montana. Statement of Claim No. 8532-76GJ claims 4.38 cfs (175 m.i.) up to 1575 acre-feet for flood irrigation of 173 acres located in the N $\frac{1}{2}$ of Section 36, Township 10 North, Range 13 West, Granite County, Montana. These claims reflect the existing decreed water rights which this Permit is to supplement.

6. Applicant alleges it has, in addition to the above-said claimed water rights (see Finding of Fact 5), established "high water rights" by diverting those flows which occur in excess of its, and other appropriators', decreed water rights, during the high-water period on Flint Creek. Applicant did not timely file claims for so-called "high-water rights", either by specifying same in Statements of Claim No. 8531-76GJ or No. 8532-76GJ, or by timely filing other claims. Thus, whether or not such "high-water rights" will ultimately be recognized by the Water Court is unknown.

7. On March 28, 1984, the Water Court issued a Temporary Preliminary Decree on Flint Creek Basin (hereafter, "T.P.D.") which recognized Applicant's claimed water rights as follows. Water Right No. 8531-76GJ was identified as 2.5 cfs up to 510.4 acre-feet per year for use on 116 acres located in the NE $\frac{1}{4}$ of Section 35, Township 10 North, Range 13 West, Granite County, Montana. Water Right No. 8532-76GJ was identified as 4.38 cfs up to 752.4 acre-feet per year for irrigation use on 166 acres located in the N $\frac{1}{2}$ of Section 36 and

5 acres located in the NE $\frac{1}{4}$ of Section 35, all in Township 10 North, Range 13 West, Granite County, Montana. The reduction in volumes (from those claimed) reflects the maximum per-acre diversion volume then allowed by the Water Court, 4.4 acre-feet per annum. Applicant objected to this volume reduction.

Although Applicant had claimed a total of 313 irrigated acres under Statements of Claim Nos. 8531-76GJ and 8532-76GJ, department records reveal Applicant made no objection to reduction of that figure to the 287 acres as described in the T.P.D. Accordingly, the Hearing Examiner finds that the T.P.D. description represents a correct statement of total irrigated acres under said claims.

8. Applicant filed this Application after the T.P.D. was issued in order to compensate for the reduction therein of volumes which Applicant had claimed, as well as to secure additional water rights, in the event its unclaimed "high-water rights" were not recognized.

9. The Application describes the proposed place of use as 287 acres, to wit: 121 acres in the NE $\frac{1}{4}$ of Section 35, Township 10 North, Range 13 West and 166 acres in the N $\frac{1}{2}$ of Section 36, Township 10 North, Range 13 West. Although the same 287 acres are encompassed by the claimed water rights to be supplemented, only 116 acres are described as the place of use in the T.P.D. for Water Right No. 8531-76GJ, while 171 acres are so described for Water Right No. 8532-76GJ. This is because 5 acres in the NE $\frac{1}{4}$ of Section 35 are part of the historic place of use for Water Right No. 8532. As the 171-acre (hereafter "the east side") place of use and the 116-acre (hereafter, "the west side") place of use were historically utilized under different water rights, this Application will be

considered as made for supplemental water for two separate places of use, one as described in the T.P.D. for Water Right No. 8531-76GJ (116 acres), and one as described in the T.P.D. for Water Right No. 8532-76GJ (171 acres).

10. Evan Kolbeck stated he thought that about 11 acre-feet per acre per annum (hereafter, abbreviated to "acre-feet per acre") is the annual per-acre diversion volume reasonably required to irrigate the places of use properly. However, as the per-acre diversion volume by the Water Court in the T.P.D. was 4.4 acre-feet per acre, and as application was made for an additional 5.6 acre-feet per acre, the grant of the Permit as applied for would have yielded, in conjunction with the reduced diversion volume recognized by the Water Court, a per-acre diversion volume of just 10 acre-feet to the acre.

11. On September 6, 1984, an "Amendment to the General Findings of Fact and Conclusions of Law to the Flint Creek Basin Temporary Preliminary Decree" (hereafter, "Amendment to the T.P.D.") was issued by the Water Court. This raised the recognized annual per-acre diversion volume standard for the Kolbeck Claims to 7.2 acre-feet per acre. Accordingly, the annual diversion volume currently identified by the Water Court for Water Right No. 8531-76GJ is 835.2 acre-feet per annum; the annual diversion volume identified for Water Right No. 8532-76GJ is 1231.2 acre-feet per annum.

12. After the recognized diversion volumes were increased by the Water Court in the Amendment to the T.P.D., Applicant did not amend its Application downward to compensate for the increase.

However, as the effect of the Amendment to the T.P.D. is Water Court recognition of about 2066 acre-feet of decreed water (out of a total 2475 acre-feet claimed) diverted for use on the 287 acres herein delineated as the containing the proposed places of use (835.2 acre-feet on the west 116 acres; 1231.2 acre-feet on the east 171 acres), only 409 acre-feet of this request can be regarded as intended to compensate for claimed decreed diversion volumes currently unrecognized by the Water Court.

13. Objectors oppose this Application because they do not believe the west-side ditch has the physical capacity to carry any more water than Applicant's claimed decreed water and Objectors' claimed decreed water. Objectors also allege that the volume requested is excessive, considering that it is to supplement existing rights of at least 7.2 acre-feet per acre to yield a total average per-acre diverted volume of 12.7 acre-feet per acre.

14. "High water", according to Evan Kolbeck, is that water which occurs in Flint Creek in excess of utilized decreed amounts. Applicant knows when "high water" exists by observing the canal of the second most junior appropriator on the source, one Mr. Thayer, whose diversion is just upstream from the Applicant. When the Thayer canal is carrying water, and there is water in Flint Creek near the Hall bridge below Kolbeck (the low spot in the creek), the water occurring at Applicant's points of diversion is "high water". In an ordinary year, "high water" exists from May 1 to August 1.

15. Although the Application requests a total of 11.4 cfs (456 m.i.) for supplemental use, Applicant really only wanted to double its decreed flow rates (175 m.i. for use on the east side; 100 m.i.

for use on the west side) in accordance with its past practice. Thus, the total request is for 275 m.i. of supplemental water. The additional 181 m.i. was erroneously included in the Application.

16. In most past years, Applicant has diverted 275 m.i. of Flint Creek water almost continuously throughout the 92-day period from May 1 to August 1, in addition to 275 m.i. of decreed water. (Testimony of Evan Kolbeck.) Assuming ninety days of continuous diversion at a rate of 275 m.i., about 1227 acre-feet of water per annum have been diverted which were not decreed to Applicant (446 acre-feet per annum for the west side; 781 acre-feet per annum for the east side).

17. Combining Applicant's claimed decreed diversion volumes, i.e., a decreed right to a volume of 900 acre-feet per annum for use on the west side, and a decreed right to a volume of 1575 acre-feet per annum on the east side, with other volumes historically diverted, i.e., about 446 acre-feet per annum on the west side and about 781 acre-feet per annum on the east side, it is found that Applicant has historically diverted a total of 1346 acre-feet per annum for irrigation of the west side, and 2356 acre-feet per annum for irrigation of the east side.

18. The west-side ditch does not presently have the physical capacity to carry more than about 550 m.i. even at its top end, i.e., from the headgate to the first "take out" on Applicant's property. Kolbeck's claimed decreed right (No. 8531-76GJ for 100 m.i.), plus the decreed water rights of the other users on the west side ditch, equals 550 m.i.

19. In past years, Applicant has been able to obtain 200 m.i. (100 m.i. of decreed water plus 100 m.i. of other water) through the west-side ditch despite the fact that the ditch has a capacity of only 550 m.i., because other ditch users have not demanded their decreed water throughout much of the high water period. Other users have not demanded their decreed water because they have been able to take advantage of significant quantities of irrigation runoff. However, these users have not abandoned, nor do they intend to abandon, their decreed rights, and will insist upon delivery of their decreed water in the future, if runoff diminishes, as it likely will, due to anticipated conversions to sprinkler irrigation in the area. (Testimony of Julia Enman.) When the other users do demand their full allocation of decreed water there will be almost no period during the irrigation season when the west-side ditch is not used to its full capacity to carry decreed water. (Testimony of Objector Parker.)

20. The east-side ditch is physically capable of carrying 1000 m.i. Applicant's decreed right (No. 8531-76GJ for 175 m.i.), plus the water rights of other users on the east side ditch, equals 472 m.i. In past years, the east-side ditch has successfully carried Applicant's decreed water, the decreed water of other ditch users, plus an additional 175 m.i.

21. Diversion of the supplemental volumes requested by Applicant (1607 Acre-feet per annum), in addition to the volumes recognized in the Amended T.P.D. as decreed to Applicant (2066 acre-feet per annum), would yield a "total amount of water diversion [which] is very high" (Department Exhibit 1: Letter to Applicant,

July 14, 1986); i.e., the total amount of water to be diverted for application at the places of use (an average diversion of 12.8 acre-feet per acre) is significantly greater than the department's estimate of the diversion volumes reasonably required for irrigation of the proposed places of use.

Although the record does not state numerically the original estimate made by the DNRC field office, said estimate can be re-calculated using printed DNRC guidelines. Irrigation of grasses at the proposed place of use, even at an application efficiency as low as 45 percent (this assumes contour ditch irrigation with a design slope of 6 percent, which is the lowest efficiency scenario set forth in the guidelines), would require only 2.45 acre-feet per acre be applied in a semi-drought year. (Application efficiency estimates used by DNRC field offices are found in the "Water Rights Bureau Field Office Irrigation Guide" prepared by Ken Chrest, DNRC Water Management Bureau.) Of course, as this number does not allow for reasonable conveyance losses, and as unlined open ditches would be used to convey the water, the volume diverted could reasonably be expected to be somewhat higher than this estimate. (For example, a conveyance efficiency of 50 percent would yield a necessary diversion volume of 4.9 acre-feet per acre.) However, for Applicant to require an average 12.8 acre-feet per acre assumes greater than 80 percent conveyance loss, and/or other inefficiency of significant magnitude. It is these apparent inefficiencies which prompted the department to warn Applicant that adequate substantiating data would be required. (Department file: letters of July 14, 1986 and December 31, 1986.)

22. There is no record data regarding the actual conveyance efficiencies of either the west-side or east-side ditch.

23. Both the east and west side places of use are underlain by a permeable gravelly substrate. Therefore, the soil water-holding capacity is minimal. (Testimony of Eva Kolbeck.) However, the west side is subirrigated, whereas the east side is not. (Testimony of Objector Parker.)

24. Based on testimony of Objector Parker, who utilizes the same diversion facility and irrigates ground similar to that of Applicants, the Hearing Examiner finds that the maximum per-acre volume of water which could be diverted without waste in the area of the west side place of use is 9 acre-feet per acre.

25. There is no indication of other planned uses or developments, for which a permit has been issued or for which water has been diverted, in the record.

PROPOSED CONCLUSIONS OF LAW

1. The department has jurisdiction over the subject matter hereunder, and over the parties hereto. MCA Title 85, Chapter 2, Part 3 (1985).

2. The department gave proper notice of the hearing and all substantive and procedural requirements of law or rule have been fulfilled, therefore the matter is properly before the Hearing Examiner. (Finding of Fact 3.)

3. The department shall issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following MCA §85-2-311 criteria are met:

- (1)(a) there are unappropriated waters in the source of supply:
- (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use, irrigation, is a beneficial use. MCA §85-2-102(2).

5. The volume of water Applicant wishes to divert hereunder, together with its decreed water, would yield a total appropriation which substantially exceeds the department's estimate of the diversion volume which is reasonably required to flood irrigate the place of use.¹ (Finding of Fact 21.) Thus, prima facie, Applicant

¹It should again be noted that the Applicant was informed of the discrepancy and warned of its significance by letters of July 14, 1986 and December 31, 1986. (Finding of Fact 21.)

is requesting more water than can be beneficially used without waste. See In the Matter of Beneficial Water Use Permit No. 61978-s76LJ by Joseph Town et al, Proposal for Decision, Footnote 1 at p. 8, March 18, 1988. Therefore, because the department cannot grant a permit for more water than can be beneficially used without waste (MCA §85-2-312[1]), in order to grant this Permit, there must be other evidence present in the record which outweighs the department's estimate, and shows that the volumes sought are in fact reasonable for the stated use, i.e., that diversion of the supplemental volumes will not result in a waste of the resource.

Applicant has presented evidence that the proposed places of use are very gravelly, and that water therefore quickly seeps below the root zone and back to the source. (Finding of Fact 21.) Thus, Applicant has shown that the proposed places of use may require more water than the department's estimate. However, as to how much more water is required, Applicant has merely presented evidence that in past years it has diverted decreed water and other water up to a total of 1346 acre-feet per annum (11.6 acre-feet per acre per annum) for irrigation of the west side, and 2356 acre-feet per year (13.8 acre-feet per acre per annum) for irrigation of the east side. (Finding of Fact 17.) Unfortunately, this evidence does not support the conclusion that 3702 acre-feet per year is reasonably necessary to irrigate those parcels. It simply demonstrates that

Applicant has diverted that volume in the past.²

Applicant presented nothing further pertaining to this issue. Thus, the only record evidence weightier than the department estimate of what amount of water is reasonably necessary is the estimate of Objector Parker, who irrigates ground similar to Applicant's in the same area. Parker testified that up to 9 acre-feet per acre would be a reasonable volume for irrigation of Kolbeck's west side place of use. (Finding of Fact 24.) Using this standard, it is found that the total volume diverted in the past for use on the west side is about 29 percent excessive, i.e., only 77.6 percent of the total volume historically diverted was reasonably required.

Although the record is mute, the same irrigation methods were most probably used on the east side. Accordingly, volume diverted for use on the east side is presumed to be equally excessive. 77.6 percent of Applicant's historic east side per-acre diversion (13.8 acre-feet per acre) is 10.7 acre-feet per acre. Therefore, by analogy, 10.7 acre-feet per acre is the maximum volume reasonable for use on the east side. (Apparently, the east side requires more water per acre than the west side because the west side is subirrigated, whereas, the east side is not. See Finding of Fact 23.)

²Applicant may contemplate using the same irrigation methods which were historically used, but which are simply not reasonably efficient by modern standards, i.e., do not wisely utilize and conserve the resource. See 85-1-101(3).

It is thus hereby concluded that the total volume of water reasonably needed for irrigation of the west side is 1044 acre-feet per annum (116 acres times 9 acre-feet per acre); the total amount of water reasonably needed for irrigation of the east side is approximately 1830 acre-feet per annum (171 acres times 10.7 acre-feet per acre). Because the T.P.D. indicates a minimum of 835 acre-feet out of Claim No. 8531-76GJ will be recognized as historically diverted for use on the west side, the maximum required west side supplemental volume is 209 acre-feet per annum. As the T.P.D. indicates a minimum of 1231 acre-feet out of Claim No. 8532-76GJ will be recognized as historically diverted for use on the east side, the maximum required east side supplemental volume is 599 acre-feet per annum.

6. The "unappropriated water" referred to in MCA §85-2-311 is water which is physically present at the proposed point of diversion, and for which no legitimate call is made. See In the Matter of Application for Beneficial Water Use Permit No. 60667-s76G by Wayne and Kathleen Hadley, Proposal for Decision, March 21, 1988. The record shows that in most past years 175 m.i. of unappropriated water has been present at the point of diversion for east side irrigation, when Applicant could use it, throughout the period of diversion proposed herein. (Findings of Fact 14, 15.) There is no evidence that this will change in the future. Therefore, it can be concluded that 175 m.i. up to 780 acre-feet per year are available as set forth in MCA §85-2-311 (1)(a).

However, Applicant has not proven that there is any other unappropriated water available. Although Applicant has presented evidence that the 100 m.i. of water historically diverted by Applicant over and above his 100 m.i. of decreed water for use on the west side was available when it could be used, throughout the proposed period of diversion, this water will most probably be called for in the future by the Objectors hereto. (Finding of Fact 19.) Therefore, it must be considered appropriated water for purposes of this decision. As Applicant thus did not prove that any water other than appropriated water ever exists at the west side diversion, it cannot be concluded that more than 175 m.i. up to 780 acre-feet of unappropriated water is available as described in MCA §85-2-311(1)(a).

7. Because the west-side ditch only has the capacity to carry a flow of 550 m.i. (Finding of Fact 18), and because the fortuitous set of circumstances which have allowed Applicant to remove 200 m.i. of water from said ditch in the past most probably will not continue long into the future (Finding of Fact 19), it is concluded, for the purposes of this decision, that the ditch as it exists is only capable of delivering 100 m.i. to the Applicant. In other words, the ditch, as it presently exists, is not adequate to deliver any more to Applicant than Applicant's 100 m.i. of decreed water.

8. The east-side ditch has the capacity to carry a flow of 1000 m.i. (Finding of Fact 20.) As the total flow in said ditch, if the permit were granted would be 647 m.i., and as this means of diversion and operation have been adequate in the past under similar use, (Finding of Fact 21), it is concluded that the construction and operation of the east-side diversion works is adequate.

9. No effect apart from the possibility of having to call Applicant for delivery of water, or having to employ a ditch rider, has been alleged. As these alleged effects are not adverse effects per se within the meaning of MCA §85-2-311(1)(b), and as there is no adverse effect otherwise apparent from the record, it is concluded that the water rights of a prior appropriator will not be adversely affected.

10. Because the Final Decree of the Water Court pertaining to claimed Water Right No. 8532-76GJ may not specify an historically diverted annual volume (see MCA §85-2-234(5)(b) as amended in 1987), or because the volume ultimately decreed may be greater than 1231 acre-feet per annum, in order to preserve continuing compliance with MCA §85-2-312 the permit must be conditioned to restrict supplemental diversion hereunder if more than 1231 acre-feet per annum are diverted pursuant to Water Right 8532-76GJ.

11. The proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been diverted. (Finding of Fact 23.)

WHEREFORE, based on the foregoing Finding of Facts and Conclusions of Law, the Hearing Examiner propounds the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions and limitations set forth below, Application for Beneficial Water Use Permit No. 56793-76GJ by Kolbeck Ranches, Inc. is hereby granted to appropriate

4.375 cfs (175 m.i.) up to 599 acre-feet per annum from Flint Creek, a tributary of the Clark Fork River, from May 1 to August 1, inclusive, each year, by means of headgate located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 9 North, Range 13 West, Granite County, Montana, and ditch, for supplemental flood irrigation of 166 acres located in the N $\frac{1}{2}$ of Section 36, and 5 acres located in the NE $\frac{1}{4}$ of Section 35, all in Township 10 North, Range 13 West, Granite County, Montana. The priority date is August 17, 1984 at 2:10 p.m. The remainder of the appropriation requested in the Application is hereby denied. This permit is issued subject to the following express conditions, limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such water rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittees to divert water to the detriment of any senior or junior appropriator.

B. The Permittees shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. Permittee shall not divert water hereunder to the extent diversion of water under (claimed) Water Right No. 8532-76GJ exceeds 1231 acre-feet per annum. For example, if Applicant diverts 1500 acre-feet in a given year under Water Right No. 8532-76GJ, it may only divert 330 acre-feet pursuant hereto in that year.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 7th day of April, 1988.



Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 7th day of April, 1988, as follows:

Kolbeck Ranches, Inc.
Box 36
Hall, MT 59837

Carl Nelson Ranch Company
Star Route 35
Drummond, MT 59832

Johnmarywell, Inc.
Box 31
Hall, MT 59832

Mike McLane
Missoula Field Manager
P O Box 5004
Missoula, MT 59801



Susan Howard
Hearings Reporter